

Service Date: June 28, 1990

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of Burlington Northern Railroad)	
Company to discontinue its agency)	DOCKET NO. T-9162
and dispose of the depot facility)	
at Chester, Montana.)	ORDER NO. 5982a

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ORDER DENYING MOTION FOR REHEARING

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BACKGROUND

Burlington Northern Railroad Company (BN) applied to the Montana Public Service Commission (Commission) on December 18, 1987 for authority to discontinue its agency operations in Chester, Montana (Chester).

The Commission held a duly noticed public hearing on October 19, 1988 in the Liberty County Courthouse, Chester, Montana, before Danny Oberg, Commissioner and Hearing Examiner.

Following the hearing, parties including Intervenor Liberty County agreed to brief the issues of whether farmers are shippers (although not directly contracting for shipper services) and

whether safety is properly an element of public convenience and necessity. Testimony raised the foregoing issues.

On February 20, 1990 the hearing examiner issued a Proposed Order, finding that the agency at Chester was not required for public convenience and necessity and granting BN's request to close the agency.

Intervenor Liberty County, after the Commission granted its Request for Enlargement of Time, filed Exceptions to Proposed Order and Motion for Rehearing and Supporting Brief.

BN responded on May 24, 1990 and Liberty County has filed a reply to the response.

FINDINGS

Parties have thoroughly briefed the matter of BN's application to close the agency at Chester, from the issues raised in testimony at the hearing on "safety" and "farmers as shippers," to the issues raised in Intervenor's Exceptions to the Proposed Order and the Motion for Rehearing.

Intervenor had full opportunity to present and/or cross-examine shipper and general public testimony at the hearing on October 19, 1988, and in fact, testimony was extensive.

The Commission properly found that applying either the narrower test of the public convenience and necessity of the shipping public or the broader test of the burdens to the general public results in a determination that public convenience and necessity does not require the agency at Chester to remain open. See ¶ 41, Proposed Order.

DISCUSSION, FURTHER FINDINGS AND ANALYSIS Exceptions to Proposed Order

Intervenor's Exceptions and its brief make vague unsupported assertions which do not meet the requirements of ARM 38.2.4803(2).

(2) Contents. Briefs on exceptions and replies must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities on which the party relies, and specific citations to the transcript, if prepared. Parties are cautioned that vague assertions as to what the record shows or doesn't show, without citation to the precise portion of the record, may be accorded little attention.

Intervenor takes exception to the fact that the "Background" of the Proposed Order does not state that only § 69-14-202, MCA, is applied as found prior to the 1989 amendment. An order is taken in its entirety and "Background" is presented as a convenience to show what procedure preceded the analysis and ultimate findings. The issue of the standard applied is fully developed in ¶¶ 37-41 and 42-45. In ¶ 41 the Proposed Order states that the Commission does not need to decide which standard applies because application of either would result in a grant of agency closure at Chester. However, the Commission was being generous in its analysis and procedure. The Commission allowed extensive testimony on issues of safety and other general concerns; it allowed an opportunity for complete briefing on these issues; and it considered these additional concerns in its Proposed Order. Therefore, Intervenor is in error to state that the Commission only considered the pre-1989 law. Nevertheless, the Commission was only required to decide BN's application under the law in effect at the time it applied for authority to close the agency. See Peterson v. Livestock Commission, 120 Mont. 140, 150, 181 P.2d 152.

Intervenor asserts that the change in agents due to the retirement of the agent at the time of the hearing merits a new hearing. (Intervenor mistakenly cites to ¶ 10 instead of the correct ¶ 9.) Intervenor fails to cite any authority for this assertion. The identity of the agent is irrelevant to the showing of whether the agency is required for public convenience and necessity.

Intervenor takes exception to BN's contacting the local shippers to determine whether its Centralized Billing Center (CBC) is adequately performing the agency functions and whether the local agency is required for public convenience and necessity. Again, Intervenor cites no authority. Furthermore, it fails to set forth the precise portions of the decision to which exception is taken. These vague assertions are accorded very little weight. ARM 38.2.4803(2). Without making inquiries, BN would be unable to determine whether to apply for closure of a particular agency. BN would also be hampered in meeting its burden of proof on its application without knowing whether it could adequately meet shippers' needs without the local agency.

Intervenor's exception to ¶ 37 of the Proposed Order fails to fully disclose ¶ 37 and its reasoning. The basis for the exception appears to be an allegation that § 69-14-202(1), MCA, and § 69-14-202(2), MCA, should be read independently. However, the two paragraphs were properly construed in entirety. The railroad shall maintain and staff such facilities as "they were" maintained and staffed (in this case for shipping) on January 1, 1987 "§ 69-14-202(1)", unless the railroad demonstrates to the Commission in a public hearing that a facility is not required for public convenience and necessity "§ 69-14-202(2)". At the time of BN's application, if the facility was staffed for the purposes of shipping, the railroad was required to demonstrate that the facility was not required for the public convenience and necessity of the shipping public. If the facility was staffed to accommodate passengers "see § 69-14-202(1)", then the Commission would have examined whether the public convenience and necessity of the traveling public required the agency to remain open. Paragraph 37 contains only one part of the reasoning found in the discussion in the order, and sets out the traditional standard in an application for closure of an agency. Intervenor has mischaracterized the Commission's position as being solely contained in this paragraph.

Intervenor takes exception to ¶ 42 (and by extension, ¶ 43) without citing any authority. The Proposed Order indicates that no one claiming to be a shipper (whether "primary" or "secondary" as claimed in the Exception) who had recently engaged or utilized BN's services, appeared and testified. There was no compelling testimony or showing that shipper needs required the agency to remain open.

If farmers personally made shipping arrangements and/or established through their testimony that they would be substantially inconvenienced in shipping by the loss of the local agent, then opponents could claim a necessity to keep the agent. There was no showing here. Agency services previously provided by the local agent appear to be adequately provided by BN in its CBC. Proposed Order, > 43.

Intervenor takes exception to ¶ 45 in which the Commission finds that there is no evidence sufficient to persuade it that the agency is required to remain open for safety reasons. The Proposed Order states that fire prevention, fire reporting and maintenance of hazardous material information are not functions which can only be satisfied by the presence of a local agent. Safety has not been a component of public convenience and necessity under § 69-14-202, MCA, and Intervenor cites no authority to support a finding compelling the issue of Safety to be decisive in keeping agencies open henceforth. The 1989 amendment does not create a new burden upon the railroads to maintain agencies for receipt of hazardous materials information. Section 69-14-202(2), MCA, adds a general provision that the Commission must weigh and balance facts and testimony on burdens placed upon shipping and general public. The Commission has done so, although not required to do so under the law in effect at the time of the application, and has found that the agency was not necessary to meet safety concerns of the public.

Intervenor excepts to the de facto closure of the agency at Chester without obtaining authority to do so, prior to applying for authority to close it. Intervenor fails to cite to precise portions of the proposed decision or to the transcript. This exception is improper and a vague attempt to attack BN and the Commission by placing general and unrelated burdens upon an agency closure proceeding. Misgivings on centralization and technology are understandable. But BN did keep the agency open and staffed, then met its burden to demonstrate that the agency was not required to meet the public convenience and necessity. Neither the Commission nor Intervenor can dictate management decisions to the railroad or rewrite the law to require an agent to have a whole new set of duties not encompassed in § 69-14-202, MCA.

The Commission finds that Intervenor's Exceptions to Proposed Order were not supported or well-founded upon a sound legal or factual basis.

Motion for Rehearing

The Commission further finds that in Intervenor's Motion for Rehearing, Intervenor failed to demonstrate a material change of fact to warrant reopening of the proceeding for the taking of additional evidence.

Intervenor has alleged, and attached a copy of a letter in support, that AG Distributors, a shipper, was unable to attend the hearing and now wants a new hearing to present evidence that it is "considering expanding the plant in Chester and foresees more shipping into the facilities." Letter, April 5, 1990. AG alleges that if it expands, an agent is helpful to spot and release cars. Furthermore, AG opines that the section crew needs "headquarters which the station agent maintains." In the first place, AG's letter acknowledges that it had the opportunity to appear at the

hearing. Second, its speculation that it may expand and could use an agent to spot cars does not rise to the level of public convenience and necessity to keep the agency open. There is no reason that BN cannot make satisfactory arrangements with the shipper out of the CBC if and when expansion occurs. The agent on the date of the hearing stated that shippers had the toll-free number which cut out one step. The CBC took care of "misspot problems," he testified (TR pp. 187-88). Third, BN has already stated that it will not dispose of the facilities which it intends to maintain for the section crew. Any housekeeping duties the agent may have performed in the past are not essential to the public convenience and necessity.

In its Motion for Rehearing, Intervenor alleges that a new hearing is required to consider the effects of agency closure upon the present agent. The identity of the agent, however, is irrelevant to the issue of public convenience and necessity. (See ¶ 12 herein.) The Commission routinely directs in agency closure orders that the railroad shall apply employment protection pursuant to § 69-14-1001, MCA, as required. This requirement applies, as appropriate, to any affected employee.

Intervenor alleges in its motion that there is a material change of law because of the 1989 amendment to § 69-14-202, MCA. (Amendment underlined.)

69-14-202. Duty to furnish shipping and passenger facilities. (1)

Every person, corporation, or association operating a railroad in the state on January 1, 1987, or a successor thereto, shall maintain and staff facilities for shipment and delivery of freight and shall ship and deliver freight and accommodate passengers in such facilities as were maintained and staffed on January 1, 1987.

(2) However, if a person, corporation, or association operating a railroad demonstrates to the public service commission, following an opportunity for a public hearing in the community where the facility is situated, that a facility is not required for public convenience and necessity, the commission shall authorize the closure, consolidation,

or centralization of the facility. In determining public convenience and necessity, the commission shall, prior to making its decision, weigh and balance the facts and testimony presented at the hearing, including the facts and testimony presented by the general public, the existing burdens on the railroad, the burdens placed upon the shipping and general public if the application is granted, and any other factors the commission considers significant to provide adequate rail service.

As thoroughly discussed in the Proposed Order, the Commission did apply both the narrower test of the Pre-1989 amendment and the broader test in its determination that public convenience and necessity do not require the agency to remain open. Testimony was ample for the Commission to weigh and balance. Intervenor has made no specific allegations of additional evidence of general public concerns for the Commission to consider, which would compel a finding of public convenience and necessity under the law as amended. In fact, Intervenor's only allegation concerned the vague speculation of a member of the shipping public who already had an opportunity to appear at the first hearing. Intervenor alleges that it did not have an opportunity to argue the meaning of the amendment. Yet the record is clear that there was testimony on general issues and parties fully briefed issues of general concern, including safety and the definition of "shipper." These issues were considered in the Proposed Order. Liberty County had ample protection of its due process rights and right to participate.

FURTHER DISCUSSION AND CONCLUSIONS

Intervenor has attributed almost magical powers to the local agency staffed by an agent. Yet in a lengthy hearing with ample testimony, BN met its burden of proof that it was adequately performing agency duties from its CBC. It was apparent that public convenience and

necessity did not require the agency facility at Chester to remain open. The fact that agency duties were transferred to the CBC does not amount to a de facto closure, as Intervenor alleges. BN has continued to maintain and staff the facility at Chester pending a final decision in this matter, as required by § 69-14-202, MCA.

If the Commission denies its motion for rehearing, Intervenor indicates it may appeal to district court or apply for a writ of mandamus to order the Commission to hold a rehearing. However, a writ of mandate only issues to compel a duty which the law specially enjoins. § 27-26-102, MCA. Mandamus lies only to compel a clear legal duty. Sullivan v. Treasurer, 140 Mont. 609, 370 P.2d 762 (1962). Holding a rehearing is a matter of discretion on the part of the Commission, not a clear legal duty. ARM 38.2.4805.

The Commission has found that there is no material change of fact to reopen the proceeding, nor does the public interest require the reopening. The law is not changed by the amendment to § 69-14-202, MCA, to an extent requiring a rehearing. The somewhat broader test per the amendment was applied to the same set of facts at the time of BN's application as exists today, notwithstanding the present speculation of a shipper that it may expand. Although BN was only required to meet the narrower test existing at the time of its application, it met both tests, based upon consideration of ample testimony that anticipated the legislative change. A rehearing is not required under these circumstances and would be an idle act.

CONCLUSIONS OF LAW

1. The Public Service Commission has jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 14, MCA.

2. The Commission has jurisdiction to consider applications for rehearing and exceptions to proposed orders, pursuant to its rules found in ARM 38.2.4803 and 38.2.4805, and to grant rehearing at its discretion.

3. The Commission concludes that the Applicant for rehearing has failed to establish a material change of law or fact warranting a rehearing, nor has it demonstrated that the public interest requires the matter to be reopened.

4. The Commission concludes that the exceptions to the Proposed Order were based upon vague assertions not supported in the record or by authorities.

ORDER

NOW, THEREFORE IT IS ORDERED that Intervenor Liberty County's Motion for Rehearing is Denied.

IT IS FURTHER ORDERED that Intervenor Liberty County's Exceptions to Proposed Order and request to amend the Proposed Order is Denied.

Done and Dated this 28th day of June, 1990 by a vote of 5-0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

HOWARD L. ELLIS, Vice Chairman

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.